IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 72-734**

UNITED STATES OF AMERICA,
*Petitioner,*

—v.—

JOHN P. CALANDRA,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

### Interest of *Amicus**

The American Civil Liberties Union is a nationwide non-partisan organization of over 180,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-three year existence the ACLU has been concerned particularly with devices used by the Government to invade the privacy of citizens. ACLU policy stands unequivocally opposed to general warrants and dragnet searches of any person by any agency of the government whatsoever. The ACLU also opposes

* Letters of consent from the Government and from counsel for Respondent Calandra to the filing of this brief have been filed with the Clerk.

the admission of illegally obtained evidence in any legal proceeding, including a grand jury.

In the context of grand jury proceedings the ACLU believes that witnesses should have full procedural protection when questioned by a grand jury, including standing to allege invasion of their constitutional rights by the Government. The ACLU does not believe that a grant of immunity, however broad, is sufficient to protect a witness' constitutional rights. All of these issues are involved in this case.

## Statement of the Case

Respondent, president of Royal Machine and Tool Company in Cleveland, was called before a special grand jury in August, 1971, eight months after the offices of his company had been thoroughly searched by governmental agents pursuant to a search warrant. After having been granted immunity pursuant to 18 U.S.C. §2514, respondent moved in the District Court to suppress material seized as a result of the search on several grounds, attacking both the warrant which was the basis for the search and the scope of the search actually conducted. The Government acknowledged the questions which it intended to ask respondent before the grand jury were based on items seized during the search.

The district court held[1] that respondent, as a witness before a grand jury, had standing to challenge the sub-

[1] The decisions below are reported, in the District Court for the Northern District of Ohio at 332 F. Supp. 737 (1971), and in the Court of Appeals for the Sixth Circuit, 465 F.2d at 1218 (1972).

poena commanding his appearance and to move for suppression, and after a hearing on the merits upheld respondent's claims and ordered the items seized suppressed, directed their return and specified that respondent need not answer any questions before the grand jury based thereon. The court of appeals unanimously affirmed, finding both that respondent had standing and "that the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause [for the search] . . . " and "that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment." 465 F.2d at 1226-1227 n. 5.[2] The case is before the Court on a writ of certiorari.

[2] *Amicus* in this brief will not discuss the questions of probable cause for the warrant or scope of the search itself, as respondent, who is more familiar with the proceedings below, is better suited to discuss them. For purposes of this brief, we assume, as both lower courts found, that the search was overbroad and its authorizing warrant not supported by probable cause.

## ARGUMENT

### I.

**A grand jury witness has a constitutional right to refuse to answer questions propounded to him when the basis for the questions is evidence obtained by means of search of his place of business conducted by the government in violation of the Fourth Amendment.**

The Government contends that Respondent lacks standing to challenge the basis of the questions asked him by the grand jury. Under this proposition, the grand jury, an arm of the federal court, may ignore statutory and constitutional restrictions which protect citizens against all-encompassing government interference. This argument "reduces the Fourth Amendment to a form of words," *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 391 (1920), and must be rejected. As stated by this Court, "nothing can destroy a Government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence." *Mapp* v. *Ohio,* 367 U.S. 643, 659 (1961). All facets of the rationale of the exclusionary rule, clearly applicable at trial (*Mapp* v. *Ohio, supra; Weeks* v. *United States,* 232 U.S. 383 (1914); *Elkins* v. *United States,* 364 U.S. 206 (1960)), support its application to federal grand juries as well.

#### A. *This witness has constitutional standing to move for suppression*

Rule 41(e) of the Federal Rules of Criminal Procedure permits "[a] person aggrieved by an unlawful search" to move in the appropriate district court for suppression of

the evidence seized. Of course, the scope of the Rule is coextensive with, and not broader than, the exclusionary rule formulated by this Court. *Alderman* v. *United States,* 394 U.S. 165, 173 n. 6 (1969); *Jones* v. *United States,* 362 U.S. 257, 261 (1960). Under *Alderman* and *Jones,* respondent herein clearly is a "person aggrieved," for it was his place of business which was illegally searched and his papers which were illegally seized. The Fourth Amendment grants to each citizen the right to be free from government-authorized searches and seizures, unless certain conditions be met:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Respondent challenged the validity of a search directly affecting the privacy of *his* "papers and effects"; as stated by this Court, he is a "victim of an invasion of privacy." *Jones* v. *United States,* 362 U.S. at 261. The invasion of his constitutional rights is clearly sufficient as a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult Constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Security of one's papers and effects is specifically "within the zone of interests to be protected by . . . the Constitutional guarantee in question," thereby assuring standing to litigate the issue. *Association*

*of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). See also *In re Grand Jury Proceedings, Harrisburg, Pa. (Egan)*, 450 F.2d 199, 210-211 (3d Cir. 1971) (opinion of Adams, J.), *aff'd* 408 U.S. 41 (1972).

Such a witness has unquestionably suffered immediate and serious harm. He is entitled to challenge the illegal basis for the search which led to the questions posed by the grand jury because no other effective means is available to guarantee the full range of his constitutional rights or to vindicate their infringement. As more fully discussed *infra*, exclusion of the illegally seized evidence at trial does not avail a witness, such as respondent, who has been granted immunity from prosecution. Without recourse to suppression, such a witness is at the mercy of a government which may flout the Constitution with impunity.

Even if later suppression were available, delay until trial chills the First Amendment rights of the witness, his associates, and indeed any citizen who may be subjected to a general search predicated upon an unconstitutional warrant. *United States* v. *Rumely*, 345 U.S. 41 (1953); 354 U.S. 178 (1957), *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960), *Konigsberg* v. *State Bar*, 366 U.S. 36 at 73-74 (1961) (Black, J., dissenting). On the relationship between the First and Fourth Amendments, see especially *Stanford* v. *Texas*, 379 U.S. 476 (1965). These threats to fragile constitutional rights must not be tolerated. The constitutional issue is ripe for adjudication at the time the witness is called before the grand jury.

Nor does the grant of immunity to this witness in any way impair his standing to challenge the basis of grand jury questions. In *Gelbard* v. *United States*, 408 U.S. 41

(1972), this Court held that a grand jury witness has a statutory defense to a contempt citation when the grand jury questions he refused to answer were the friuts of illegal electronic surveillance. In *United States* v. *Egan,* the companion case to *Gelbard,* the witness had been granted transactional immunity from prosecution, 408 U.S. at 45. In analyzing standing to raise the statutory defense, this Court did not distinguish between Egan and Gelbard (who had not been given immunity), suggesting that immunity has no effect on standing. Furthermore, the Court of Appeals for the Third Circuit in *Egan* specifically passed on the question of whether an immunity grant vitiated a witness's standing to assent the statutory defense, holding:

> The fact that Sister Egan has been granted §2514 immunity does not deprive her of standing to raise §2515 as a defense to a proposed judgment of civil contempt, because she is not complaining of Fifth Amendment violations, but rather of Fourth Amendment ones. Surely, even though Sister Egan has been offered immunity from prosecution, she continues to have a substantial interest in preventing the Government from compounding its original violation of her privacy by forcing her to answer questions that would concededly not be asked absent the information discovered through the use of unwarranted wiretaps. (450 F.2d at 210.)

Accord, *In re Evans,* 452 F.2d 1239 (D.C. Cir. 1971). The Court of Appeals in *Egan* reached the same conclusion with respect to Egan's constitutional claim. 450 F.2d at 211-212. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of crimi-

nal behavior." *Camara* v. *Municipal Court*, 387 U.S. 523, 530 (1967).

This position is consistent with this Court's concern over the protection of Fourth Amendment rights, and logically applies with the equal force to the assertion of a constitutional as opposed to a statutory right. Clearly, no grant of immunity can adequately protect the infringement of fourth amendment rights involved in this case, especially in light of the effect on critical First Amendment rights.

It is well established that the Fourth Amendment is applicable to grand jury process. In *Hale* v. *Henkel*, 201 U.S. 43 (1906), this Court held that a grand jury subpoena for production of books and papers constituted an unreasonable search and seizure. Since *Hale* v. *Henkel*, other courts have struck down grand jury subpoenas which were unreasonable under the Fourth Amendment. *Schwimmer* v. *United States*, 232 F.2d 855, 860 (8th Cir.), *cert. denied* 352 U.S. 833 (1956); *In re Grand Jury Investigation*, 174 F. Supp. 393, 395 (S.D.N.Y. 1959); see also Fed. R. Crim. P. 17(c). The Fourth Amendment has also been applied to prohibit grand jury investigation resulting from illegally seized evidence. See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), discussed more fully at pp. 11-13, *infra*.

Respondent's standing is clear when considering what he did *not* challenge in the district court. He did not challenge the existence of the grand jury itself, or the constitutionality of the statute, violations of which it was investigating. In this respect this case is clearly distinguishable from *Blair* v. *United States*, 250 U.S. 273 (1919). In *Blair*, a grand jury witness sought to challenge the con-

stitutionality of a federal statute as beyond the power of Congress. Of course this Court held he lacked standing to do so. Accord, *Frothingham* v. *Mellon*, 262 U.S. 447 (1923); see also *Flast* v. *Cohen*, 392 U.S. 83 (1968), *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Here respondent challenged government action as breaching an express limitation on governmental power, the Fourth Amendment. Applying the tests of standing articulated in *Flast* v. *Cohen*, *supra*, *Baker* v. *Carr*, *supra*, and elsewhere, Calandra has standing to assert his constitutional claim.

*Blair* is also distinguishable on another ground. This Court has held that constitutionality of a criminal statute is not passed upon in advance of necessity. See, e.g., *United States* v. *United Automobile Workers Union*, 352 U.S. 567, 589-592 (1957). Orderly adjudication requires that such decisions be made only after full evidentiary proceedings in which the factual context of the statute's application is elaborated. That is the point of *Blair*. Here, respondent did not challenge the constitutionality of a statute under which he may at some future time be indicted; his claim is against unlawful government invasion of his rights which led directly to the questions asked him by the grand jury.

Calandra also did not challenge an indictment against him returned by a grand jury arguably on the basis of insufficient or illegally obtained evidence. Not only may such a witness not assert vicariously possible constitutional claims of others; faced with a criminal prosecution, he has available immediately an effective means of redressing an injury to him, namely, suppression or evidentiary objection at trial. Thus, *United States* v. *Blue*, 384 U.S. 251 (1966), and

*Costello* v. *United States*, 350 U.S. 359 (1956), are clearly distinguishable.

Finally, Calandra did not make a generalized objection to the investigative powers of grand jury (see *Blair* v. *United States*, 250 U.S. 273, 282 (1919); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972)), or to the right of the public to his testimony (see *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). His objection was limited to a claim that his property be seized and his testimony be sought through lawful process, as required by the Fourth Amendment. He sought relief from the direct consequences of a specific violation of a plainly articulated constitutional right, at a time when the government was attempting to use the results of its unlawful conduct against him. As stated by Judge Miller, speaking for the court below, "we deal with a fundamental constitutional claim that is ripe." 465 F.2d at 1226.

**B. *The exclusionary rule prohibits questions to this witness based upon evidence illegally seized from him***

This Court has long held that evidence obtained in violation of the Constitution may not be introduced at a federal trial. *Weeks* v. *United States*, 232 U.S. 383 (1914). This holding has been expanded to bar introduction of such evidence in state prosecutions. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In these and other cases (see especially *Elkins* v. *United States*, 364 U.S. 206 (1960)), the Court has articulated three principal rationale for the necessity of the exclusionary rule at trial. All three support its availability to grand jury witnesses as well.

The first is "the imperative of judicial integrity." *Elkins* v. *United States*, *supra* at 222. See also *Weeks* v. *United*

*States, supra,* 232 U.S. at 394; *Harrison* v. *United States,* 392 U.S. 219, 224 n. 10 (1968). As stated by Mr. Justice Holmes, "no distinction can be made between the Government as prosecutor and the Government as judge. If the existing [criminal] code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such inequities to succeed." *Olmstead* v. *United States,* 277 U.S. 438, 470 (dissenting opinion). A conviction based upon illegally seized evidence makes the courts "accomplices" by tacit approval in the illegality. Compare *McNabb* v. *United States,* 318 U.S. 332, 344-345 (1943). Judicial complicity in executive violations of the Constitution is no less serious when the executive seeks to use the fruits of an unconstitutional seizure to elicit further evidence from the very victim of the seizure, albeit before a grand jury rather than in open court. To countenance use of the fruits of illegal executive activity in either case tarnishes the integrity of the federal courts.

Secondly, the exclusionary rule affords the victim of an unconstitutional search and seizure the means of preventing a further invasion of his right of privacy. Use by the government of tainted evidence "infringe[s] yet further" the rights secured by the Fourth Amendment. See *Dodge* v. *United States,* 272 U.S. 530, 532 (1926); *Mapp* v. *Ohio,* 367 U.S. 643, 647-648 (1961). This is so regardless of whether further testimony is sought by the grand jury or by the prosecutor at trial. The witness's rights have been infringed; in both instances their further infringement is equally flagrant when the executive seeks exploitation of that infringement against its victim.

*Silverthorne Lumber Co:* v. *United States,* 251 U.S. 385 (1920), forcefully illustrates this proposition. In *Silver-*

*thorne* federal marshals illegally seized from the Silverthorne Lumber Company's offices all books, records and papers found there. The seized documents were copied by the government. On application, the district court ordered the originals returned but impounded the copies. The grand jury then subpoenaed the originals, and on refusal to comply, the court ordered production of the originals, despite a finding that the original seizure was unconstitutional. On appeal, this Court reversed. Speaking through Mr. Justice Holmes, the Court held (251 U.S. at 391-392):

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States,* 232 U.S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all.*[3] (Emphasis supplied.)

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[3] This holding was recently reaffirmed in *Harrison* v. *United States,* 392 U.S. 219, 222 (1968). See also *Gelbard* v. *United States,* 408 U.S. 41, 62-69 (Douglas, J., concurring).

The facts in this case are strikingly similar to those in *Silverthorne*. After illegally seizing the respondent's records, the government now seeks to compound its misdeed by asking respondent to elaborate on their contents under threat of contempt. Such a procedure surely "reduces the Fourth Amendment to a form of words," and subjects respondent to a further government intrusion, one for which a grant of immunity is scant compensation.

The third and most important foundation for the exclusionary rule is its deterrent effect on law enforcement officers:

> The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. *Elkins* v. *United States*, 364 U.S. at 217.

This Court in *Mapp* v. *Ohio*, overruling *Wolf* v. *Colorado*, 338 U.S. 25 (1949), held that the exclusionary rule is the only effective means of enforcing the Fourth Amendment. It is common knowledge that sovereign immunity and a notorious lack of sympathy on the part of prosecutors and juries make criminal prosecution of, or civil suits against, police officers hollow remedies for violations of a fundamental right. See *Wolf* v. *Colorado*, 338 U.S. at 41-47 (Murphy, J., dissenting). Congress has recognized this when electronic surveillance is involved. The Senate report on Title III of the Omnibus Crime Control and Safe Streets Act states:

> Section 2515 of [18 U.S.C.] imposes an evidentiary sanction to compel compliance with the other prohibitions of this chapter. It provides that intercepted wire

> or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. . . . [I]t does apply across the board in both Federal and State proceedings. And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Senate Report No. 1097, 90th Cong., 2d Sess. (1968), 2 U.S. Code Cong. and Ad. News 2112, 2184-2185.

To permit use of illegally seized evidence to compel further testimony from the victim of the seizure would truly "grant the right but in reality . . . withhold its privilege and enjoyment" (*Mapp* v. *Ohio, supra,* 357 U.S. at 656); for this would allow the prosecutor, the police and the grand jury to gather evidence without constitutional constraint and then use it extensively after obtaining a few immunity grants.[4] What citizen would be free from the threat of warrantless or general search, at any time of day or night, in his home or place of business? The injury from an unconstitutional search is not merely the use of the objects seized in a criminal prosecution against the victim;

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[4] The Government's unsupported assurance that "the instances of such international police action must be comparatively rare" (Gov't Br. at 18) is contradictory to other government arguments that the grand jury be permitted broad investigatory powers, and certainly has a very hollow ring in view of recent disclosures of extensive and carefully planned acts of illegality by the government (see pp. 15-17, *infra*). Furthermore, even an isolated case of illegal police actions does not excuse the conduct involved nor restore to its victim the constitutional rights infringed.

the damage is done when an individual's privacy is disturbed by the government. It is against precisely this intrusion that the fourth amendment protects each of us.

Judicial sanction of executive use of the fruits of its unconstitutional acts can only lead to disrespect for law generally. Over forty years ago Mr. Justice Brandeis eloquently observed:

> Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States,* 277 U.S. 438, 485 (dissenting opinion).

The continuing disclosures around the Watergate affair testify to the reality of the dangers hypothesized by Mr. Justice Brandeis, and vindicate the claims persistently put forward to this Court for the strictest construction of the Fourth Amendment.

During the past several months we have been confronted almost on a daily basis with one startling revelation after another describing actual and planned criminal conduct by government officials, in complete disregard of the Fourth Amendment and relevant criminal statutes. Thus, we know from the President's own statements (*New York Times,* May 23, 1973, p. 28) that government officials were engaged

in a massive program involving spying, wiretapping, and burglaries. We know, also from the President's own statement, that breaking and entering by government agents is not just a recent practice, but had been utilized at least from 1941 to 1966. *New York Times,* May 23, 1973, p. 28; May 24, 1973, p. 34.

We also learn from the President's own statement about the burglary of Daniel Ellsberg's files and records from the office of his psychiatrist, pursuant to the President's instruction that "as a matter of first priority, the [plumber's] unit should find out all it could about Mr. Ellsberg's associates and his motives." *New York Times,* May 23, 1973, p. 28.

In addition to the private citizens who were targets of illegal government activities in disregard of Fourth Amendment prohibitions, members of the press were also victims of spying and burglary, thereby implicating the First Amendment as well as the Fourth, as in *Stanford* v. *Texas, supra.* Thus, four newsmen were victims of wiretapping (Transcript of Press Conference of William D. Ruckelshaus, Acting Director, FBI, May 14, 1973, p. 2), and there was an unexecuted plan to burglarize the offices of the publisher of the *Las Vegas Times* who, according to James McCord, had "information in his safe that would be damaging to a Democratic Presidential candidate." *New York Times,* May 23, 1973, p. 30.

The Watergate relevations establish that some government officers succumb too often and too easily to the temptation to disregard the strictures embodied in the Fourth Amendment. It is only the application of the exclusionary rule that, in the context of criminal proceedings, can insure

that the government not be allowed to profit from its illegal acts, that the government will be deterred from engaging in its illegal acts, and that private citizens not be made to suffer sanctions out of the fruits of those illegal acts.

Grand jury proceedings are an integral part of federal criminal proceedings, and those who are compelled to appear before a grand jury, as the respondent here, ought to be beneficiaries of the Fourth Amendment to the same extent as if they were defendants in a criminal prosecution. There is no reason it should be otherwise, for constitutional principles and the basic notions of a democratic society must condemn and penalize illegal government conduct whatever the forum in which the fruits of illegal acts are sought to be used.

Though the case at bar is hardly as notorious as any of the adventures recounted in the course of the Watergate affair, the constitutional interests are identical and the Court must come to the conclusion that the questions cannot be asked of respondent because they are fatally tainted by illegality.

To safeguard the individual liberties guaranteed by the constitution, the exclusionary rule requires that respondent's claim be sustained.

## II.

## The problem of delay.

The government in its brief (pp. 12-14) complains of the "interruption and interference" to grand jury proceedings caused by judicial determination of the validity of a search warrant which led to questions asked a witness, characterizing such a determination as "collateral." Such a determination may be "collateral" to the investigation of the grand jury, just as a witness's assertion of his Fifth Amendment privilege is "collateral" to grand jury interrogation, or as a pretrial suppression hearing is "collateral" to a trial. Courts have long held that such "collateral" adjudication is available to challenge grand jury process on grounds of privilege (e.g., *Blau* v. *United States,* 340 U.S. 332 (1951) (husband-wife privilege); *United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963) (attorney-client privilege); Comment, The Rights of a Witness before a Grand Jury, 1967 Duke L. J. 97, 121-122) as well as on constitutional grounds. *Hale* v. *Henkel, supra; Silverthorne Lumber Co.* v. *United States, supra.* Congress has expressly provided for "collateral" litigation of the basis for grand jury questions where the questions may be based upon illegal electronic surveillance. 18 U.S.C. §2515; *Gelbard* v. *United States,* 408 U.S. at 46-52. The investigatory and interrogatory powers of the grand jury are necessarily broad, but they are not boundless; and the grand jury itself, with no member of the judiciary present during its exercise of these powers, was not meant to evaluate the rights of individuals. It is the supervisory federal court, under whose authority the grand jury is convened, which must balance

an individual's rights against society's interest in "a thorough and extensive investigation" (*Wood* v. *Georgia,* 370 U.S. 375, 392 (1962)). "Interference" of the sort alleged by the Government is thus a necessary and long-recognized guard against overzealous grand jury activities.

There is no reason to believe that adjudication of a constitutional claim such as Calandra's will unduly prolong or disrupt grand jury proceedings. Unlike a case involving electronic surveillance, the Government need not search its records to ascertain whether the questions were based upon a particular wiretap. District courts are frequently called upon to evaluate probable cause for a search warrant during pretrial suppression hearings. This Court has established workable standards for determination of both probable cause for a warrant and scope of searches conducted. See, e.g., *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *United States* v. *Ventresca,* 380 U.S. 102 (1965); *Stanford* v. *Texas, supra.* The vast majority of witnesses do not and will not in the future refuse to respond to grand jury interrogation. Should a future hostile witness assert a frivolous Fourth Amendment claim, a suppression or contempt hearing will take no longer than the prosecutor's representation that no illegal search took place. An obstructionist witness can, of course, be compelled to answer once the government demonstrates that any search conducted was pursuant to and in compliance with the terms of a lawful warrant. *Gelbard* v. *United States,* 408 U.S. at 71 (White, J., concurring); *In re Evans,* 452 F.2d at 1246-1247.

Finally, any incidental delay occasioned by a suppression hearing is a feeble counterweight indeed when balanced against the witness's constitutional right to be free

from unauthorized government interference. "The grand jury's operation—and indeed our entire criminal process—could be streamlined if our laws and the constitution left room for draconian efforts to obtain evidence from defendants or witnesses," *In re Evans*, 452 F.2d at 1249; our laws and the constitution, however, place an individual's rights above such streamlined efficiency of the criminal process. This question was carefully considered by the court below in this case, whose trenchant analysis merits quotation at length:

> The [district court] has properly focused upon the serious flaw of the Government's position. Increasingly, our criminal process is concerned not with the isolated individual event but with matters of considerable scope involving numerous persons, some of whom are central to the suspected or alleged crime and some of whom are not. Specifically, this tendency is a result of the increasing concern of law enforcement with "organized crime" and with conspiracies whether connected with commerce or with violence. Under such circumstances, it is both logical and proper that police should concentrate their greatest effort on the key figures rather than "small fry" of suspected criminal activity. For example, it is agreed that the key to dealing adequately with the trade in heroin is not the "pusher on the street." Under such circumstances, the temptation to ignore the rights of individuals not involved or thought crucial, in order to obtain knowledge useful in investigating the larger suspected illicit enterprise, is natural and understandable.
>
> It is, however, precisely this temptation which the Fourth Amendment and the exclusionary rule were de-

vised to restrain. The Fourth Amendment reflects a considered decision that, in our scheme of government, the individual's right to privacy shall not invariably give way to what is deemed most efficient and expedient in the prosecution of crime. Suppression of the fruit of the violation of that right to privacy, for example, has been considered the most effective means of dealing with the temptation to violate it.

The importance of suppression as a device is directly proportional to the incentive that exists to violate the right. Where, as here, the incentive is greatest, access to the motion to suppress attains maximum importance. 465 F.2d at 1226.

Efficiency of the criminal process must yield to constitutional and statutory limits on governmental power.

## CONCLUSION

**For the reasons stated above, the judgment below should be affirmed.**

Respectfully submitted,

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August 1973

No. 72-734

# In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. CALANDRA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR SIXTH CIRCUIT*

## REPLY MEMORANDUM FOR THE UNITED STATES

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HENRY E. PETERSEN,
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## REPLY MEMORANDUM FOR THE UNITED STATES

We deem it appropriate to make a short reply to respondent's brief. We here focus on the argument that, whatever the propriety of allowing the grand jury to consider the physical records seized from him, respondent cannot be required to testify before the grand jury because the information which prompted his subpoena and which will provide a basis for questioning him derived from the allegedly unlawful search and seizure.[1] Subpoenaing and questioning him on the basis of such information, the argument runs, constitute additional Fourth Amendment invasions distinct from the initial invasion of privacy.

1. This novel proposition misconceives the function of the Fourth Amendment. Its purpose is not to make relevant evidence inaccessible. The Amendment in no

[1] As we pointed out in our main brief (Br. 8), while we believe the search and seizure were valid, we do not ask this Court to review this issue.

way qualifies the rule that the grand jury is entitled to every man's evidence. Insofar as it bears on criminal investigations, the Fourth Amendment is primarily concerned with means: it assures that relevant evidence shall not be obtained in ways that unreasonably intrude on privacy. But—with perhaps very rare exceptions, cf. *Griswold* v. *Connecticut,* 381 U.S. 479, 484; *Warden* v. *Hayden,* 387 U.S. 294, 303-the Amendment itself excludes no document or information merely because of its "private" character. See *Katz* v. *United States,* 389 U.S. 347, 350-351.

Normally, the Fourth Amendment is not implicated when evidence is sought to be obtained by subpoena. To be sure, a demand for records may be so wide-ranging as to impose an undue burden—absent special justification—and the Court has interposed the Fourth Amendment in that situation. *Hale* v. *Henkel,* 201 U.S. 43. In the circumstances of the present case, however, there would have been no arguable Fourth Amendment objection to subpoenaing the limited records in suit—whatever the violation involved in obtaining them in the search of respondent's business premises. Nor is there now any basis for invoking the Fourth Amendment as a bar to calling respondent as a witness before the grand jury.

It is no sound objection that questioning respondent will breach his privacy and compel him to make disclosure of matters he would rather keep to himself. That is simply a necessary sacrifice which every citizen is required to make for the sake of justice. Except only for specially privileged matter, the law compels every man to contribute whatever relevant information he may have, however embarrassing or unpleasant the duty. See *United States* v. *Dionisio,* 410 U.S. 1, 9; *Branzburg* v. *Hayes,* 408 U.S. 665, 688.

Whatever privileges may excuse a witness from responding to particular questions in a grand jury proceeding, the Fourth Amendment itself confers no immunity from compulsory testimony. In *Katz* v. *United States, supra,* the Court held that surreptitious eavesdropping on unguarded private conversations may violate the constitutional rule. But it has never been suggested that *compelled testimony* is in any way regulated by the Fourth Amendment.[2] Else, "probable cause" would be a prerequisite to calling a witness, or requiring a response, in every proceeding, whether administrative, legislative, or judicial, civil or criminal. And that, of course, is not the law. See *United States* v. *Dionisio, supra,* 410 U.S. at 9-13; *Branzburg* v. *Hayes, supra,* 408 U.S. at 701-706; *United States* v. *Powell,* 379 U.S. 48, 57, and cases there cited.

2. This disposes of respondent's claim that requiring him to answer grand jury questions would constitute a fresh invasion of his Fourth Amendment rights. Although respondent is at pains to avoid it (Br. 9, 10), the real threshold issue in this case is whether the *exclusionary rule* fashioned to deter violations of the Amendment should be extended to bar grand jury questions based on illegally obtained evidence. We have fully dealt with this matter in our original brief and do not repeat that discussion here. It may be appropriate, however, to add a word about *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, on which respondent so heavily relies.

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[2] Arguably, an exception might be made for compelled testimony that is sought as a *substitute* for written records, the production of which could be resisted under the Fourth Amendment. See Mr. Justice Douglas, concurring, in *Gelbard* v. *United States,* 408 U.S. 41, 64 n. 1. But that is not our situation: we are here addressing respondent's complaint that he will be required to reveal information *beyond* what the seized records show.

The first thing to be said about *Silverthorne* is that it had nothing whatever to do with *new* evidence sought to be elicited from the victim of a Fourth Amendment violation. The situation there was that of two indicted individuals, whose papers had been seized "without a shadow of authority" and ordered returned, who were now objecting to the government's attempt to recapture the very same papers by issuing a subpoena in the name of the grand jury. Accordingly, that decision does not support respondent's objection to testifying to matters not immediately disclosed by the the seized records.

Nor does *Silverthorne* govern our case even with respect to the records seized in the allegedly illegal search. For here there are two critical differences: as we stress in our main brief, no Fourth Amendment violation had been established before the grand jury proceedings were under way; and respondent, unlike the Silverthornes, has been offered immunity and therefore cannot be legally injured by the grand jury's consideration of his papers.[3]

We recognize, of course, that some of the sweeping language of the *Silverthorne* opinion, especially the epigramatic conclusion that illegally obtained evidence "shall not be used at all," can be stretched further. But that *dictum*—unnecessary to the decision—has not,

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[3] Contrary to respondent's assertion (Br. 17-18), *Hale* v. *Henkel*, *supra*, does not foreclose our argument that a grant of immunity deprives a grand jury witness of standing to invoke the exclusionary rule. First, that case involved no application of the exclusionary rule, but the quite distinct claim that compliance with the subpoena would itself invade Fourth Amendment rights. Moreover, that claim was in fact rejected as to the immunized individual witness. 201 U.S. at 73-77.

in fact, been followed by this Court in applying the exclusionary rule. Respondent concedes as much (Br. 10, n. 9). We submit there is no occasion here to apply *Silverthorne* beyond its own facts.

Finally, if it were necessary to do so—we think not—we would urge that *Silverthorne* was wrongly decided and that the force of the precedent has been eroded by subsequent decisions. Indeed, except for the earlier illegality, there does not seem to have been any Fourth Amendment obstacle to the subpoena for the Silverthorne papers and, as our main brief demonstrates, no subsequent ruling of this Court suggests that—absent a special statutory provision—the exclusionary rule applies to grand jury proceedings. See Mr. Justice White, concurring, in *Gelbard* v. *United States,* 408 U.S. 41, 70. In these circumstances, it is difficult to justify the *Silverthorne* result. Nevertheless, should the Court determine to leave the *Silverthorne* holding unimpaired, it would be inappropriate, we think, to extend its logic to dissimilar cases.

For the reasons stated here and in our main brief, the judgment below should be reversed.

Respectfully submitted.

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OCTOBER 1973.